

2009-1383

(Serial No. 08/998,507)

In The
United States Court of Appeals
For The Federal Circuit

IN RE ALBERT BAUER

**APPEAL FROM THE UNITED STATES PATENT AND
TRADEMARK OFFICE, BOARD OF PATENT APPEALS
AND INTERFERENCES**

REPLY BRIEF OF APPELLANT

William J. Sapone
COLEMAN SUDOL SAPONE P.C.
714 Colorado Avenue
Bridgeport, Connecticut 06605
(203) 366-3560

Counsel for Appellant

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THE LEX GROUPDC ♦ 1750 K Street, N.W. ♦ Suite 475 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelxgroupdc.com

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APPELLANTS REPLY BRIEF

In response to the Brief for Appellee - The Director of the United States patent and Trademark Office (the "Director"), the Appellant would offer the following reply.

"If the facts don't fit the theory, change the facts."

Albert Einstein, (attributed)

1. Claim 44 Is Patentable

The Patent Office appears to have adopted the above as a tool for analysis, expressed more accurately in this context as, "if the claim doesn't fit the facts, change the claim."

For example, an argument made was that:

"As the Board reasoned, a thermostat will cause dampers to open causing an increase in flow and pressure in response to a selected temperature i.e., the thermostat sends a signal to open an air damper and allows an influx of warmer air which causes an increase in pressure in the room. Thus, the Board's construction is consistent with the recited function because it requires pressure in a room to vary in a dependent fashion upon a selected room temperature." (Director Brief, p. 24)

While the operation discussed may arguably cause some minor pressure variations, there is no regulation or control of the pressure variations; these are as admitted by the Board merely "pressure variations (albeit transient)"

To avoid this deficiency, the Board changed the claim, upholding the Examiners' rejection, not of Appellants' claim, which recites "means for regulating

an increase in pressure in the at least one room . . .,” but of a claim with the following redrafted claim limitation:

“means for causing unregulated room pressure variations.”

The evidence is clear. Nowhere in the Directors’ argument is there an allegation that the transient pressure variations repeatedly referred to are regulated. Every discussion refers only to unregulated pressure variations.

The question before this Court is whether one skilled in the art would consider a claim limitation, clearly directed to means for regulating pressure, to encompass devices which have no means for regulating pressure, that is, encompassing any device or means that can simply cause pressure variations.

The Director focuses only on pressure variations, not pressure regulation. The position advanced is simply that “regulated” encompasses “unregulated” pressure variations.

In In re Buszard, 504 F.3d 1364 (Fed. Cir. 2007), this Court reviewed an anticipation rejection where the claim term at issue was a “flexible polyurethane foam reaction mixture” and the prior art disclosed a “rigid polyurethane foam.” Though it was admitted at oral argument that one skilled in the art would know that flexible polyurethane foams have a different structure and properties from a rigid foam, it was argued that the claim term encompassed rigid foams when the term was given the “broadest reasonable interpretation.”

This Court held otherwise, holding it unreasonable to ignore that the claim required not any foam but a flexible foam, and the term "flexible" would be understood by one skilled in the art to exclude a "rigid" foam.

Buszard is actually a closer question than this case. There, the prior art did use foam, and the question related to a property of the foam. Here, the alleged "broadest [un]reasonable interpretation" considers "means for regulating" to encompass devices where the regulation is absent, that is, encompassing mean for causing unregulated, transient pressure variations.

The Appellant believes the contested limitation requires an assembly of control elements which take as an input, the selected room temperature signal, and which are capable of using that signal to determine a corresponding room pressure increase, and then of taking steps to vary the room excess pressure in correspondence to (or as a function of) the selected room temperature.

One skilled in the art would understand what is involved in regulating pressure, as well as understand that according to the invention, the room pressure is regulated and caused to vary in dependence on the selected room temperature.

The Director believed to the contrary, that no such pressure regulation was necessary, that this limitation is met solely by the presence of local thermostatically controlled dampers, whose operation may cause admittedly transient pressure variations. Somehow this deficiency is excused because

"nowhere does the recited function require that pressure must vary or be increased for any particular length of time." (Director's Brief, P. 23) Of course, the recited function is not time dependent, but rather involves "means for regulating" the pressure; to meet the recited function, pressure must vary in a controlled manner, and that is not found with the thermostatically controlled damper system.

It is difficult to find anticipation where no temperature control scheme is even presented in Johansen. Moreover, it is admitted that local temperature control is irrelevant to the operation of the Johannsen dead band controller:

"Damper control boxes 21a and 21b would be thermostatically operated, in the case of an air conditioning system, by separate thermostats in the zones or rooms of the building with which their air discharge is associated, but these temperature control loops are not part of the pressure control system of the present invention, and have therefore been omitted from FIG. 1." (A730; Emphasis added)

Johannsen fails to include each and every element of claim 44 while also teaching away from the claimed invention. While the argument is made that pressure variations must occur, it cannot be ignored that operation of the dead band controller in Johannsen would counter-act any transient raising or lowering of the room pressure. Even if the dampers operated as speculated by the Director, the system must "maintain the desired pressure in the system despite variations in the air load requirements of the building."

Having found that elements existed which could cause pressure variations, the Board believed no more was needed, and committed error by failing to give fair

weight and meaning to the part of the limitation requiring "means for regulating" the pressure.

Anticipation requires a reference to describe all the elements of the claims, arranged as in the patented device. Shearing v. Iolab Corp., 975 F.2d 1541, 1544-45, 24 U.S.P.Q.2D (BNA) 1134, 1136 (Fed. Cir. 1992) (See also Dayco Products, Inc. v. Total Containment Inc., 329 F.3d 1358, 1369, 66 U.S.P.Q.2d (BNA) 1801, 1809 (Fed. Cir. 2003), anticipation requires strict identity, without guessing what the reference discloses.)

Johannsen cannot anticipate since it fails to even disclose how temperature control is effected, and specifically admits that "these temperature control loops are not part of the pressure control system of the present invention." (A730) The Board found no element performing a function similar to the Appellants' controller (200) which determines whether room pressure should be raised or lowered in correspondence to the selected room temperature and takes action to regulate the pressure accordingly. Without any control component which accepts the selected room temperature as an input and then determines a corresponding room pressure, one cannot practice the present invention. Every element of claim 44 is not present in Johannsen.

The obviousness rejection similarly fails. There is nothing in any of the cited patents which would teach, suggest or predictable lead one skilled in the art to the air conditioning system of the Appellants' invention.

2. The Video Tape is Evidence

The Solicitor dismissed the Mr. Bauer's video tape (A89-90) as being no more than "attorney argument." That is incorrect. The tape was not presented to the Examiner by an attorney. As stated in the Brief, the tape was presented by the inventor, Mr. Bauer and displayed at an interview with Examiner Ford. Mr. Bauer reviewed the results of testing shown on the tape. Mr. Bauer is the applicant, and as an applicant for a U.S. Patent, Mr. Bauer signed a declaration including a duty of candor and good faith. His oral verification of the information of the tape, in this administrative proceeding, is comparable to oral testimony. Moreover, also present was Mr. Heribert Blach, who appears on the tape. Mr. Blach corroborated, in person, that the statements made by him on the tape were true. While there is no transcript, this was an administrative proceeding and recording was not required, other than completion of an Interview Summary (A385).

The oral testimony by Mr. Bauer and Mr. Blach to the Examiner is sufficient support for considering the tape not as attorney argument but as evidence presented in support of the patentability of the claims in issue.

The weight to be given to the tape is for the Court to decide, but it should be available for consideration by the Court, just as it was for the Examiner, as it does help one understand how operation of the inventive system, which regulates room pressure in correspondence to a selected room temperature, differs from a conventional air conditioning system which has no such interrelationship between room pressure regulation and room temperature regulation.

CONCLUSION

"The difference between the right word and the almost right word is the difference between lightning and a lightning bug."

Mark Twain

The difference between the right words, "means for regulating" pressure, and the almost right words, "means for causing unregulated room pressure variations" is the difference between a reasonable interpretation and an unreasonable one. All the evidence supports interpreting the disputed claim term with the right words to literally mean - "means for regulating an increase in pressure in the at least one room relative to an outside pressure, to vary the room pressure in correspondence to the selected room temperature." Accordingly,

Appellant Albert Bauer respectfully requests this Court to reverse the Board's finding of anticipation and obviousness as to Claim 44.

Dated: December 28, 2009

Coleman Sudol Sapone P.C.

By:



William J. Sapone

Coleman Sudol Sapone P.C.

714 Colorado Avenue

Bridgeport CT 06605

Tel: (203) 366-3560

Attorney for Appellant

Albert Bauer

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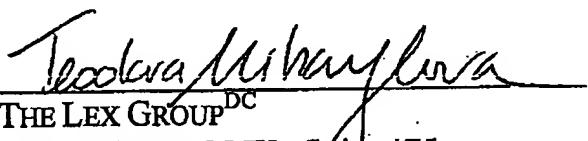
I hereby certify that on this 28th day of December, 2009, two bound copies of the Reply Brief of Appellant were served via U.S. Mail, postage prepaid, to the following:

Raymond T. Chen
William LaMarca
Nathan K. Kelley
PATENT & TRADEMARK OFFICE
Post Office Box 15667
Arlington, Virginia 22215

Counsel for Appellee

I further certify that on this 28th day of December, 2009, the required number of copies of the Reply Brief of Appellant were hand-filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit.

The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.


THE LEX GROUP^{DC}
1750 K Street, N.W., Suite 475
Washington, DC 20006
(202) 955-0001

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 28(a)(14) and Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Appellant hereby certifies that the foregoing Reply Brief of Appellant complies with the type-volume limitation proscribed in Federal Rule of Appellate Procedure 32(a)(7)(B) and was prepared using the following:

Microsoft Word 2000;

Times New Roman;

14 point typeface.

Appellant's counsel has relied on the word count function of the word-processing program used to prepare this Reply Brief of Appellant, which indicates that this brief contains 1,592 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

Respectfully Submitted,



William J. Sapone
Coleman Sudol Sapone P.C.
714 Colorado Avenue
Bridgeport CT 06605
Tel: (203) 366-3560
Attorney for Appellant
Albert Bauer

Dated: December 28, 2009